

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS RYBAR,

Plaintiff-Appellee/Cross Appellant,

v

AL SERRA CHEVROLET, INC., and GENERAL
MOTORS CORPORATION,

Defendants-Appellants/Cross Appellees.

UNPUBLISHED

October 2, 1998

No. 194277

Genesee Circuit Court

LC No. 91-007014 CP

Before: Holbrook, Jr., P.J., and Young, Jr. and J. M. Batzer*, JJ.

PER CURIAM.

This case arises from plaintiff's purchase of a defective automobile, his revocation of acceptance, and defendants' refusal to refund his money. Plaintiff was awarded \$75,104 in total damages and \$30,000 in attorney fees following a jury verdict against defendants for breach of warranty, violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901, *et seq.*; MSA 19.418(1), *et seq.*, and conversion. Defendants appeal as of right; plaintiff cross appeals on the issues of damages and attorney fees. We affirm in part, reverse in part, vacate in part, and remand.

Plaintiff's sports utility vehicle experienced a complete engine failure a few days after having had its oil changed. The vehicle had been driven a total of about 25,000 miles. The dealer and the manufacturer, defendants Al Serra Chevrolet, Inc. and General Motors Corporation, blamed the oil change facility and refused to repair the vehicle under plaintiff's warranty. Plaintiff then revoked his acceptance of the vehicle and demanded his money back. After defendants refused to return his purchase money, plaintiff sued. Plaintiff's expert testified that the engine failed when a connecting rod seized on the crankshaft due to damage resulting from insufficient bearing clearance. Based on that testimony, the jury found that plaintiff had properly revoked his acceptance under the Uniform Commercial Code ("UCC"), MCL 440.2608; MSA 19.2608, and awarded him \$20,000 on his conversion and/or breach of warranty claims,¹ plus \$50,104 on his claim under the MCPA, MCL 445.911(2); MSA 19.418(11)(2). Defendants' motions for a judgment notwithstanding the verdict, for

* Circuit judge, sitting on the Court of Appeals by assignment.

a new trial, and for a remittitur were denied. Plaintiff's motion for treble damages was also denied; his motion for attorney's fees was denied in part.

Defendants first argue that the trial court erred in denying their motion for a new trial or remittitur because the jury's verdict on the MCPA claim resulted in an excessive verdict for plaintiff. We agree in part.

The \$50,104 awarded under the MCPA was in addition to the \$20,000 awarded on the breach of warranty and/or conversion claims. The trial court refused to set aside the \$55,104 award as excessive. This Court reviews a trial court's decision to deny a motion for remittitur under an abuse of discretion standard. *Szymanski v Brown*, 221 Mich App 423, 431; 562 NW2d 212 (1997). A remittitur should be granted if there is no evidence to support the jury's damage award. *Id.*

After carefully reviewing the record, we find that the evidence introduced at trial did not support a verdict in excess of \$20,000. Based upon plaintiff's own testimony, his actual damages were no more than \$19,825.96. We can find no evidence to support the jury's decision to assess an additional \$55,104. There was also no claim or evidence to support an award of exemplary damages. Accordingly, the trial court abused its discretion in failing to grant remittitur of the \$55,104 award.

Defendants next argue that there was insufficient evidence to support the jury's verdict on plaintiff's conversion claim. We agree. In deciding if there was sufficient evidence to support the jury's verdict, we review the evidence in the light most favorable to the nonmoving party and determine whether it fails to establish plaintiff's conversion claim as a matter of law. *Orzel v Scott Drug Co*, 449 Mich 550, 557-558; 537 NW2d 208 (1995).

In this case, plaintiff showed that defendants retained his money after he, consistently with his rights under the UCC, revoked his acceptance of the vehicle and demanded the return of his money. Conversion is "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). Statutory conversion, which may entitle the plaintiff to treble damages, is knowingly "buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property . . ." MCL 600.2919a; MSA 27A.2919(1). Contrary to plaintiff's argument, however, it is well settled that an action for conversion of money can only be maintained if there was an obligation to return or deliver the specific physical money at issue. See *Check Reporting Services, Inc v Michigan Nat'l Bank-Lansing*, 191 Mich App 614, 626-627; 478 NW2d 893 (1991) (bank account funds not converted when bank applied them to pay off plaintiff's debts).² There was no such obligation here; plaintiff demanded payment of a specific sum, not the return of specific earmarked bills. Therefore, the conversion claim cannot be established as a matter of law and should not have been submitted to the jury.

Defendant General Motors also argues that plaintiff could not maintain a revocation action against it because revocation is not a remedy available against a manufacturer. However, because that argument was not raised before the trial court, it is waived and we decline to review it. *Vander Bossche v Valley Pub*, 203 Mich App 632, 641; 513 NW2d 225 (1994). We nevertheless note that

defendants presented a joint defense and did not seek to have their liability separately decided. Further, even if General Motors was not a proper party to the revocation of acceptance, the jury found that General Motors participated in the breach of warranty and violated the MCPA. The verdict was therefore independent of the jury's finding that plaintiff properly revoked his acceptance against General Motors.

Defendants also argue that the jury's verdict was confusing and that the trial court erred in not granting a new trial or remittitur on that basis. We agree in part and disagree in part.

Although we have already found error in the trial court's refusal to set aside the jury's award of \$55,104, we do not believe that the jury's verdict was confusing. Rather, the jury clearly found a breach of warranty and a violation of the MCPA, and properly awarded plaintiff \$20,000 in actual damages for the price of the vehicle plus incidental expenses.³

Lastly, defendants argue that the cumulative errors in this case necessitate a new trial. We disagree. Defendants received a fair trial despite the errors we have found. *People v Taylor*, 185 Mich App 1, 10; 460 NW2d 582 (1990); *Kovacs v Chesapeake & Ohio R Co*, 134 Mich App 514, 542; 351 NW2d 581 (1984), *aff'd* 426 Mich 647; 397 NW2d 169 (1986).

On cross appeal, plaintiff first argues that the trial court erred in not trebling the jury's award on the conversion claim. Since we have reversed the jury's verdict on the conversion claim, we need not reach this issue.

Plaintiff also makes multiple challenges to the trial court's award of attorneys fees. We agree in part and disagree in part.

As argued by plaintiff, it was error for the court to refuse to award actual attorney's fees solely on the basis of the trial judge's personal experience, and without conducting an evidentiary hearing to determine the reasonableness of plaintiff's fee request. *Miller v Meijer, Inc*, 219 Mich App 476, 479; 556 NW2d 890 (1996); *Howard v Canteen Corp*, 192 Mich App 427, 438; 481 NW2d 718 (1991). We therefore vacate the trial court's award of \$30,000 in attorney fees and remand for an evidentiary hearing and for reconsideration of this issue in light of the factors discussed in *Smolen v Dahlmann Apts, Ltd*, 186 Mich App 292, 295-296; 463 NW2d 261 (1990), and the remedial purpose of the MCPA, *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 97-98; 537 NW2d 471 (1995).

However, contrary to plaintiff's argument, the trial court did not abuse its discretion when it refused to award additional attorney fees under MCR 2.405, although an award under that court rule could have been made. *J C Building Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 426; 552 NW2d 466 (1996). Rather, we agree with the trial court that, because plaintiff was granted attorney fees under other authority, a duplicative award pursuant to MCR 2.405 was not in the interest of justice.

Finally, we agree with plaintiff that he should receive some compensation for the cost of this appeal. Accordingly, on remand, the trial court should hold an evidentiary hearing and award plaintiff

reasonable appellate fees, taking into account the mixed results of this appeal and the other factors listed in *Smolen*. See *Smolen, supra*, 186 Mich App at 297-298.

In sum, the judgment is affirmed in part, reversed in part, and vacated in part. The case is remanded for reconsideration of the two attorney fee issues in a manner consistent with this opinion. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.

/s/ Robert P. Young, Jr.

/s/ James M. Batzer

¹ The special verdict form asked the jury to award actual damages if they found that defendants had breached plaintiff's warranty "and/or" converted his money.

² At least two cases also hold that an action for conversion may be maintained where a defendant cashes a check as plaintiff's agent or bailor and keeps amounts to which he or she was not entitled. See *Hogue v Wells*, 180 Mich 19, 24; 146 NW 369 (1914) (promissory note); see also *Citizens Ins Co v Delcamp Truck Center, Inc*, 178 Mich App 570, 575-576; 444 NW2d 210 (1989) (account overpayment). Here, however, there is no similar claim and we therefore need not reach this issue.

³ Our setting aside the verdict on plaintiff's conversion claim has no effect on the award of actual damages because the award continues to be supported by the jury's finding of liability for breach of warranty and violation of the MCPA.